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Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Improving accountability and access to remedy for victims of business-related human rights abuse

Report of the United Nations High Commissioner for Human Rights

Summary

The present report sets out guidance to improve accountability and access to remedy for victims of business-related human rights abuses, following the Accountability and Remedy Project of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and in response to the request by the Human Rights Council in its resolution 26/22.

The report comprises two parts. The first part provides an introduction to the guidance, including an explanation of its scope, potential usage and important cross-cutting contextual issues. This is followed, in the annex, by the guidance itself, which takes the form of "policy objectives" for domestic legal responses, supported by a series of elements intended to demonstrate the different ways in which States can work towards meeting those objectives in practice. The report is complemented by an addendum (A/HRC/32/19/Add.1), prepared as a companion to the guidance, providing additional explanation and context drawn from the two-year research process of OHCHR.

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I. Accountability and access to remedy: the urgent need for action

1. Business enterprises can be involved with human rights abuses in many different ways; because of the adverse impacts that business enterprises may cause or contribute to through their own activities, or by virtue of their business relationships. Ensuring the legal accountability of business enterprises and access to effective remedy for persons affected by such abuses is a vital part of a State's duty to protect against business-related human rights abuse.[2]

2. At present, accountability and remedy in such cases is often elusive. Although causing or contributing to severe human rights abuses would amount to a crime in many jurisdictions, business enterprises are seldom the subject of law enforcement and criminal sanctions.[3] Human rights impacts caused by business activities give rise to causes of action in many jurisdictions, yet private claims often fail to proceed to judgment and, where a legal remedy is obtained, it frequently does not meet the international standard of "adequate, effective and prompt reparation for harm suffered".[4]

3. State-based judicial mechanisms are not the only means of achieving accountability and access to remedy in cases of business-related human rights abuses. Other possibilities may include State-based non-judicial mechanisms[5] and non-State grievance mechanisms, such as operational level grievance mechanisms.[6] However, effective State-based judicial mechanisms are "at the core of ensuring access to remedy".[7]

4. Those seeking to use judicial mechanisms to obtain a remedy face many challenges. While those challenges vary from jurisdiction to jurisdiction, there are persistent problems common to many jurisdictions. These include fragmented, poorly designed or incomplete legal regimes; lack of legal development; lack of awareness of the scope and operation of regimes; structural complexities within business enterprises; problems in gaining access to sufficient funding for private law claims; and a lack of enforcement. Those problems have all contributed to a system of domestic law remedies that is "patchy, unpredictable, often ineffective and fragile".[8]

5. The challenges are exacerbated in cross-border cases.[9] While many domestic legal regimes focus primarily on within-territory business activities and impacts, the realities of global supply chains, cross-border trade, investment, communications and movement of people are placing new demands on domestic legal regimes and those responsible for enforcing them.

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[1] See the report by J. Zerk entitled "Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies", prepared for OHCHR (February 2014), available from www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf, pp. 16-30.

[2] See principle 25 and commentary of the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31).

[3] Note, however, the distinction between corporate sanctions and sanctions on individuals (see A/HRC/32/19/Add.1, para. 4).

[4] See the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex), article I.2 (b) and VII.

[5] See principle 27 and commentary of the Guiding Principles.

[6] Ibid., principle 28 and commentary.

[7] Ibid., principle 26 and commentary.

[8] See "Corporate liability for gross human rights abuses" (note 2 above), p. 7.

[9] For a definition of "cross-border" cases, see A/HRC/32/19/Add.1, box 3.

6. The experiences of those seeking remedy suggest that there remain serious deficiencies in the implementation by many States of their international obligations with respect to access to remedy. The right to an effective remedy for harm is a core tenet of international human rights law. The obligations of States with respect to this right have been reflected in the Guiding Principles on Business and Human Rights: Implementing the Protect, Respect and Remedy Framework[10] in terms of a "State duty to protect" against business-related human rights abuses, of which providing access to an effective remedy is an integral part.[11]

7. Rectifying these deficiencies — which, in many cases, are rooted in wider social, economic and legal challenges — will not be straightforward. It will require concerted and multifaceted efforts from all States, encompassing actions relating to law reform and legal development, improvements to the functioning of judicial mechanisms, law enforcement, policy development and closer international cooperation. However, this is essential work towards realizing the imperatives of accountability and remedy for business-related human rights abuses.

II. Overview

A. Background

8. Of the three pillars of the Guiding Principles,[12] endorsed in 2011 by the Human Rights Council,[13] the "Access to remedy" pillar[14] has arguably received the least attention. In 2013, to help redress this imbalance, OHCHR, as part of its mandate to advance the protection and promotion of human rights globally, initiated a process aimed at helping States strengthen their implementation of this third pillar, particularly in cases of severe business-related human rights abuses.

9. In its resolution 26/22, the Human Rights Council requested the Commissioner to continue work on improving access to remedy and to report back to the Council.[15]

10. In November 2014, and pursuant to that mandate from the Human Rights Council, OHCHR launched the Accountability and Remedy Project.[16] An interim progress report was submitted to the Council in June 2015.[17]

B. Scope

11. The Accountability and Remedy Project focused on substantive legal and practical issues that have an impact upon the effectiveness of judicial mechanisms in achieving corporate accountability and access to remedy in cases of business-related human rights

[10] See A/HRC/17/31.
[11] See note 2, above.
[12] See A/HRC/17/31. The three "pillars" of the Guiding Principles are the "State duty to protect human rights", the "Corporate responsibility to respect human rights" and "Access to remedy".
[13] See Human Rights Council resolution 17/4.
[14] See principles 25 to 31 of the Guiding Principles.
[15] See Human Rights Council resolution 26/22, para. 7.
[16] See www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.
[17] A/HRC/29/39.

abuses, with a particular emphasis on cases of severe abuses.[18] The project focused on six areas: (a) domestic law tests for corporate legal liability; (b) the roles and responsibilities of interested States in cross-border cases; (c) overcoming financial obstacles to legal claims; (d) criminal law sanctions; (e) civil law remedies; and (f) domestic prosecution bodies. Those six themes were selected as areas that require urgent attention and where developments were capable of delivering improvements to accountability and remedy in the short to medium term.

12. While it was necessary to limit the scope to these six priority areas due to time and resource constraints, it is recognized that there are other important aspects of access to remedy which the project has not covered. These include strengthening State-based non-judicial grievance mechanisms and non-State-based grievance mechanisms as important complements to judicial remedies; individual liability of corporate officers and directors; reforms to rules of court procedure; measures to ensure protection of victims and their representatives from intimidation and threats of reprisals; and wider political, social and economic challenges to the rule of law, including corruption, lack of judicial independence and lack of capacity in many domestic legal systems.[19]

C. Methodology

13. To better understand the challenges that exist at the domestic level and the initiatives likely to be most effective given the diversity of legal structures, traditions and approaches around the world,[20] OHCHR gathered empirical information from a wide range of jurisdictions on the functioning of domestic legal systems and relevant regimes. This was done through a global online consultation, country-specific reports, reviews of existing research, research projects relating to cross-border and international cooperation, interviews with prosecutors, multi-stakeholder consultations, two workshops with State representatives, engagements with business, civil society and national human rights institutions and online consultative processes at key milestones in the project.[21] Through its collaboration with the Working Group on the issue of human rights and transnational corporations and other business enterprises, OHCHR also held consultations during the Forum on Business and Human Rights and the Africa and Asia regional forums on business and human rights. All key documents and milestones of the project were communicated directly to States and made available to other stakeholders through relevant platforms and information-sharing channels.[22] Regular briefings on the project were held for delegates of the Human Rights Council.

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[18] The emphasis on severe abuses was determined following practical and strategic considerations, including the need for comparability of data on existing State practices, but does not suggest that other categories of harm do not also require a domestic legal response. Business enterprises can have an impact upon virtually the entire spectrum of internationally recognized human rights, and that impact can range in type, nature and severity. The guidance is not limited to "severe" human rights abuses. However, where business involvement in severe human rights abuses may demand a particular response, for example, in the case of specially targeted legal regimes, this has been highlighted in the guidance. For more information about the choice of scope, see www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

[19] See principle 26 and commentary of the Guiding Principles, and para. 15 below.

[20] See A/HRC/32/19/Add.1, para. 5.

[21] See note 16 above.

[22] See business-humanrights.org/en/ohchr-accountability-and-remedy-project.

D. Structure of the guidance

14. The structure chosen for the guidance, on the basis of a series of policy objectives and elements to demonstrate the different ways objectives can be achieved, is deliberately flexible. There are many differences among jurisdictions in terms of legal structures, cultures, traditions and resources, all of which have implications for future law reform. To ensure global relevance and applicability, the guidance is designed to be readily adaptable to a range of different legal systems and contexts and, at the same time, practical, forward-looking and reflective of international standards on access to remedy.

15. The guidance should not be regarded as a finite list of possible solutions to the problems identified in the course of the work of OHCHR. There may be other ways of achieving the underlying goal of improving implementation by States of the Guiding Principles. Nor should the guidance be read as an exhaustive list of the actions to be taken by States to implement the "Access to remedy" pillar. Deficiencies in domestic legal systems with respect to accountability and access to remedy may have their roots in wider challenges, including poverty, lack of capacity and lack of respect for the rule of law, which may require more fundamental and wide-ranging reforms.

16. Nevertheless, the guidance will be a significant resource for States seeking to improve the effectiveness of their domestic legal responses to business and human rights challenges and, beyond this, as a possible platform for future dialogue, cross-fertilization of ideas, innovation and progress.

17. In recognition of the distinct features of public and private remedial mechanisms, the guidance has been divided into two parts: one relating to the enforcement of public law offences and one relating to private law claims by affected individuals and communities. Although domestic legal regimes do not necessarily fall neatly into one or other category, and although there are barriers common to both methods of enforcement, there are sufficient differences between the two to warrant separate treatment in the guidance. The addendum to the present document provides further explanation and context in relation to the different components of the guidance. In addition, a set of generalized illustrative examples of State practice, demonstrating the ways that States can implement different aspects of the guidance, are available from the website of OHCHR.[23]

18. Figures 1 and 2 below set out in graphic form an overview of the different components of the guidance, the relationships between those different components and their implications for accountability and access to remedy.

[23] See www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

Figure 1

Enforcement of public law offences: implications of key features of domestic law regimes for accountability and access to remedy (Part I)

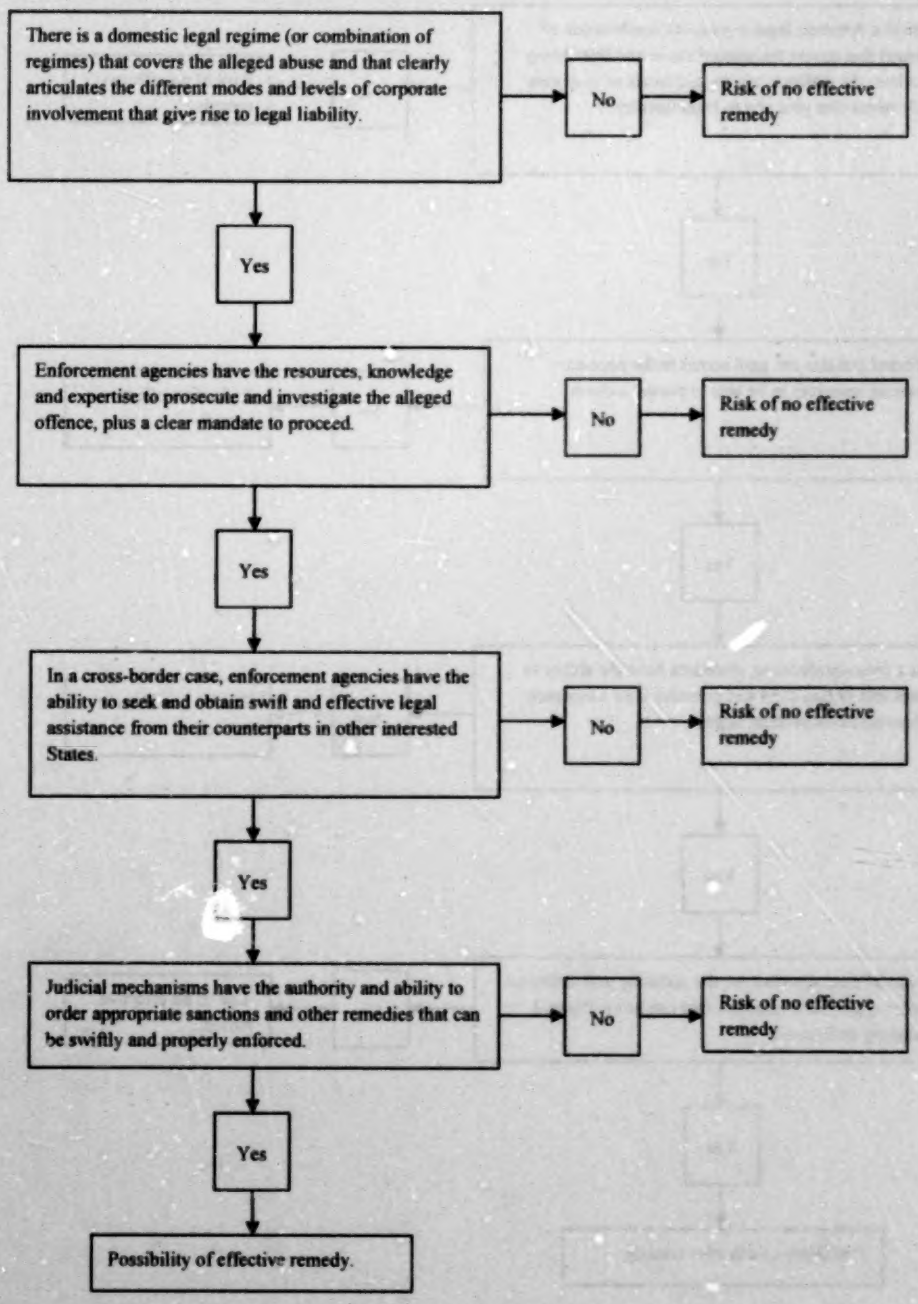
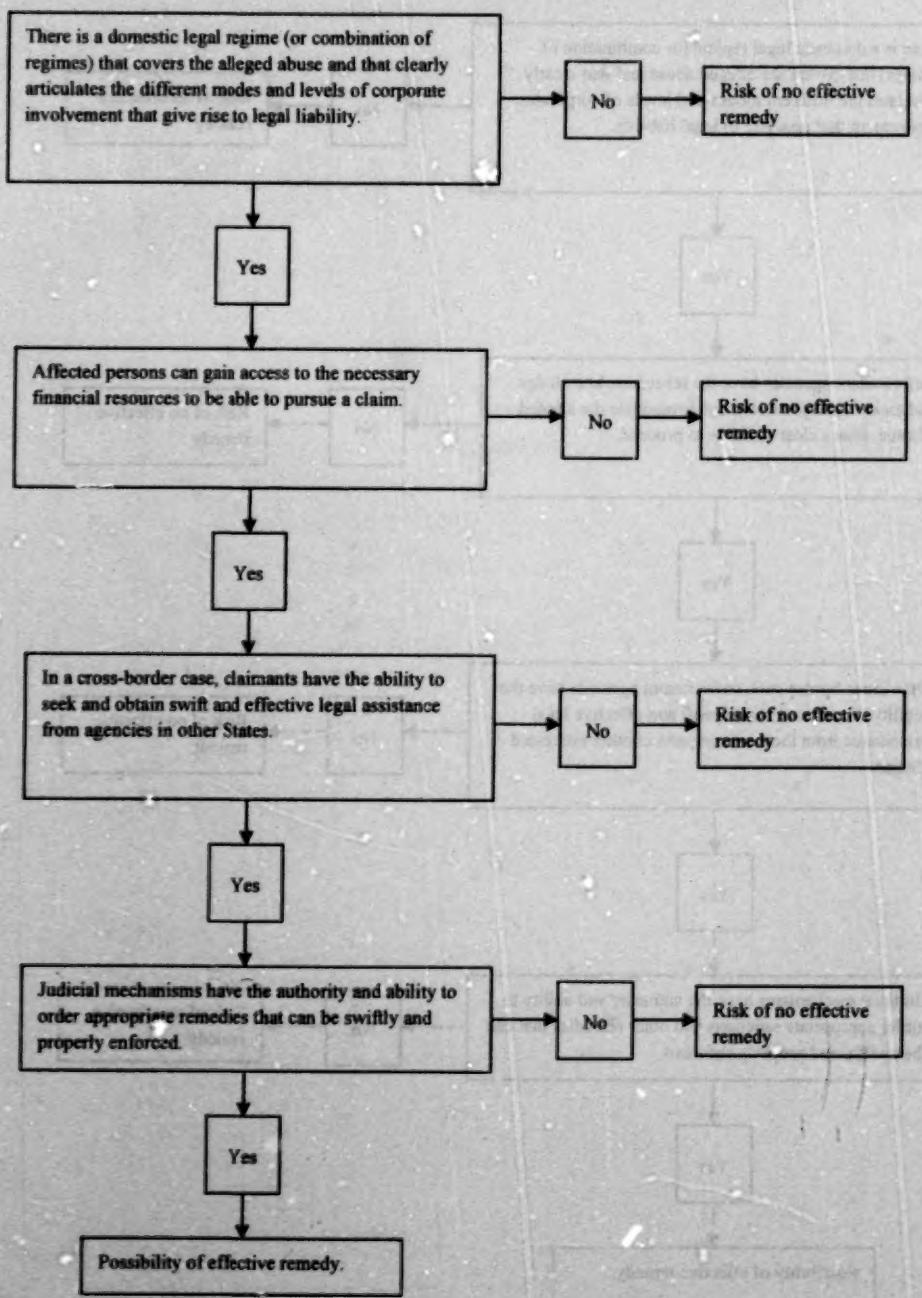

There is a domestic legal regime (or combination of regimes) that covers the alleged abuse and that clearly articulates the different modes and levels of corporate involvement that give rise to legal liability.
No
Risk of no effective remedy
Yes
Enforcement agencies have the resources, knowledge and expertise to prosecute and investigate the alleged offence, plus a clear mandate to proceed.
No
Risk of no effective remedy
Yes
In a cross-border case, enforcement agencies have the ability to seek and obtain swift and effective legal assistance from their counterparts in other interested States.
No
Risk of no effective remedy
Yes
Judicial mechanisms have the authority and ability to order appropriate sanctions and other remedies that can be swiftly and properly enforced.
No
Risk of no effective remedy
Yes
Possibility of effective remedy.

Figure 2

Private law claims by affected individuals and communities: implications of key features of domestic law regimes for accountability and access to remedy (Part II)


There is a domestic legal regime (or combination of regimes) that covers the alleged abuse and that clearly articulates the different modes and levels of corporate involvement that give rise to legal liability.
No
Risk of no effective remedy
Yes
Affected persons can gain access to the necessary financial resources to be able to pursue a claim.
No
Risk of no effective remedy
Yes
In a cross-border case, claimants have the ability to seek and obtain swift and effective legal assistance from agencies in other States.
No
Risk of no effective remedy
Yes
Judicial mechanisms have the authority and ability to order appropriate remedies that can be swiftly and properly enforced.
No
Risk of no effective remedy
Yes
Possibility of effective remedy.

E. Target audience

19. The guidance is addressed primarily to State agencies and judicial bodies concerned with the development, administration and enforcement of domestic legal regimes that regulate the respect by business enterprises of human rights. States can implement the guidance in a variety of ways, for example, through a domestic legal review process, as part of national action plans on business and human rights, as part of strategies to improve access to justice or other processes as may be suitable to the particular domestic context. The guidance will also be relevant to the work of policymakers and practitioners, including those involved in legislative drafting, prosecutors and other law enforcement officials, and national human rights institutions. The guidance may also help to inform the ongoing work of international bodies with mandates relevant to business and human rights, including human rights treaty bodies. Various elements of the guidance can be used to guide business enterprises and may be drawn upon by other stakeholders, such as civil society organizations and trade unions.

III. Three cross-cutting issues

20. The addendum provides further context and explanation for each component of the guidance. However, the following three issues have particular implications for corporate accountability and access to remedy in cases of business-related human rights abuses and are important to understand for effective implementation of the guidance.

A. Structural and managerial complexity of business enterprises

21. Business enterprises can take many legal and structural forms. They may be single corporate entities (or "companies") or a group of companies working together through relationships on the basis of shared ownership, or contract, or both. The company law doctrine of "separate corporate personality" is recognized in most, if not all, jurisdictions. Under this doctrine, each company, as a separately incorporated legal entity, is treated as having a separate existence from its owners and managers. Consequently, a company (a parent company) that owns shares in another company (a subsidiary) will not generally be held legally responsible for acts, omissions or liabilities of that subsidiary merely on the basis of the shareholding.

22. This means that legal liability for the adverse human rights impacts of a subsidiary's activities may not extend beyond the subsidiary itself, unless the liability of the parent company can be established on some other basis (e.g., because of the parent company's own negligence in the way the subsidiary was managed or because of some specific legislative provision).[24] In many jurisdictions, however, the law relating to parent company liability in cases of business-related human rights abuses is in the early stages of development, creating an uncertain basis for legal action against parent companies (and other constituent members of business enterprises). On the other hand, there will be cases in which a claim against a parent company may be the only way of securing an effective remedy for the human rights impacts of a subsidiary's activities, such as where the subsidiary has been dissolved, is insolvent or has insufficient resources to meet a legal claim for damages.

[24] See A/HRC/32/19.Add.1, paras. 6-23 and 42-56.

23. The legal uncertainty in many jurisdictions surrounding the extent to which parent companies (and other constituent companies within a business enterprise) have legal responsibilities under domestic law regimes to identify, prevent and mitigate human rights abuses connected with that business enterprise's operations is not only a barrier to remedy itself, but also gives rise to further barriers, including by adding to legal costs and creating delays. For those reasons, the guidance relating to both public law offences and private law claims opens with a set of suggestions relating to the development of legal regimes that respond more readily to the practicalities of organization and management of business enterprises,[25] and which take into account the particular challenges arising from complex global supply chains.[26]

B. Challenges particular to cross-border cases and the importance of international cooperation

24. Cross-border cases[27] pose particular challenges that can undermine efforts to ensure accountability and access to remedy. The prevailing lack of clarity across jurisdictions about the roles and responsibilities of different interested States in cross-border cases create a significant risk that no action will be taken, leaving victims with no prospect of remedy. Against that background, various human rights treaty bodies have recommended that home States take steps to prevent business-related human rights abuses by business enterprises domiciled in their jurisdiction.[28]

25. The extent of international cooperation in cross-border cases has a crucial bearing on accountability and access to remedy in practice. States have entered into a range of bilateral and multilateral arrangements to support, facilitate and enable international cooperation with respect to legal assistance and enforcement of judgments in cross-border cases, including cases concerning business-related human rights abuses.[29] Some of these include provisions concerning the desired or required use of jurisdiction in cross-border cases.[30]

26. Some international instruments relevant to cross-border human rights cases also include provisions designed to facilitate greater cross-border exchange of information between domestic law enforcement and judicial bodies, and provisions aimed at improving regulatory effectiveness more generally, reflecting a recognition by participating States of the benefits of greater alignment of regulatory and investigative standards and capacities as a way of strengthening and deepening cooperative responses to global regulatory challenges.[31]

27. Regardless of whether formal international legal arrangements are in place, State agencies can experience a range of practical challenges that can undermine effective cooperation, including a lack of information about how to make a request to agencies in other States, a lack of opportunities for cross-border consultation and coordination, differences of approach regarding issues of privacy and the protection of sensitive information, a lack of resources needed to process requests in a timely manner and a lack of awareness of investigative standards in other States.

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[25] See annex, paras. 1.5 and 12.3.
[26] Ibid., paras. 1.6 and 12.4.
[27] See note 9 above.
[28] See A/HRC/32/19.Add.1, para. 33.
[29] Ibid, para. 36.
[30] Ibid., para. 34.
[31] Ibid., para. 36.

28. For those reasons, the guidance includes a series of recommendations designed to improve the effectiveness of cross-border cooperation between relevant State agencies and judicial bodies, tailored to the contexts of both public law enforcement[32] and private law claims.[33]

C. The need for policy coherence

29. Legal and policy reforms will often have more impact as a package of measures than on their own. Some of the elements in the guidance will depend for their effectiveness on other supporting measures. Awareness of this interconnectedness is needed to avoid the piecemeal development of legal responses for business and human rights issues that has thus far hampered the effectiveness of domestic legal regimes in many jurisdictions. States should strive for both "vertical" and "horizontal" policy coherence in the development of laws and policies that have implications for business and human rights.[34]

30. Weak, incoherent or inconsistent regulation not only undermines the effectiveness of legal regimes, but also creates additional barriers to accountability by adding to the costs and complexities of enforcement and creates legal uncertainties and compliance dilemmas for companies. There is room for improvement in the domestic law responses of every State. To support greater policy coherence, the identification of areas for improvement in domestic legal responses may require a formal legal review. To assist States in that regard, OHCHR has developed a model terms of reference for a formal legal review of the effectiveness of domestic legal regimes that may be adapted to respond to local challenges and needs.[35]

IV. Recommendations

31. **Member States should:**

(a) **As part of their implementation of the "Access to remedy" pillar of the Guiding Principles, consider undertaking a review of the coverage and effectiveness of their domestic law regimes that regulate the respect by business enterprises of human rights, using the guidance in the annex to the present report as a starting point, with a view to (i) developing policies and legal reforms that respond more effectively to the practicalities of organization and management of business enterprises and which take into account the particular challenges arising from complex global supply chains; and (ii) improving the effectiveness of State-based judicial mechanisms as a means of delivering corporate accountability and remedy in cases of business-related human rights abuses;**

(b) **Develop a comprehensive strategy for implementation of the guidance in a manner that responds appropriately to local legal structures, challenges and needs, for instance, as part of national action plans on business and human rights, and/or as part of strategies to improve access to justice generally;**

(c) **Take steps, using the guidance, to improve the effectiveness of cross-border cooperation between State agencies and judicial bodies, with respect to both public and private law enforcement of domestic legal regimes.**

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[32] See annex, paras. 9.1-9.7 and 10.1.

[33] Ibid., paras. 17.1-17.5 and 18.1-18.2.

[34] See principle 8 and commentary of the Guiding Principles.

[35] See A/HRC/32/19.Add.1, para. 5.

Annex

Guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse*

I. Enforcement of public law offences

Principles for assessing corporate legal liability

Policy objective 1: Domestic public law regimes that are relevant to the respect by business enterprises of human rights ("domestic public law regimes") are sufficiently detailed and robust to ensure that there is both effective deterrence from and effective remedy in the event of business-related human rights abuses.

1.1 Domestic public law regimes (a) provide the necessary coverage with respect to business-related human rights abuses; (b) adopt legislative, regulatory and policy measures appropriate to the type, nature and severity of different business-related human rights impacts; and (c) are clear as to whether, and the extent to which, they impose legal obligations on companies.

1.2 Domestic public law regimes make appropriate provisions for corporate criminal liability, or its functional equivalent, in cases where business-related human rights impacts are severe.

1.3 Corporate legal liability under domestic public law regimes does not depend, in law or in practice, on a prior successful conviction of an individual offender.

1.4 Domestic public law regimes apply principles for assessing corporate legal liability that focus on the quality of corporate management and the actions, omissions and intentions of individual officers or employees.

1.5 Domestic public law regimes communicate clearly the standards of management and supervision expected of different corporate constituents of group business enterprises with respect to the identification, prevention and mitigation of human rights impacts associated with or arising from group operations, on the basis of their role and position within the group business enterprise, and take appropriate account of the diversity of relationships and linkages through which business enterprises may operate, including equity-based and contract-based relationships.

1.6 Domestic public law regimes communicate clearly the standards of management and supervision expected of business enterprises with respect to the identification, prevention and mitigation of any human rights impacts within their supply chains that a business enterprise may cause or contribute to as a result of its policies practices or operations.

1.7 In the distribution of evidential burdens of proof between an enforcement agency and a defendant company, domestic public law regimes strike an appropriate balance between considerations of access to remedy and fairness to all parties.

1.8 Domestic public law regimes are clear as to their geographic scope.

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* See A/HRC/32/19.Add.1. See also www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx.

1.9 The State regularly reviews[b] whether its domestic public law regimes provide the necessary coverage and the appropriate range of approaches with respect to business-related human rights impacts in the light of evolving circumstances and the State's obligations under international human rights treaties and takes the necessary legislative and/or policy steps to correct any deficiencies in coverage or approach.

Policy objective 2: Domestic public law regimes are sufficiently robust to ensure that there is both effective deterrence from and remedy in the event of corporate contributions to business-related human rights abuses perpetrated by third parties.

2.1 Domestic public law regimes (a) communicate clearly the different modes and degrees of contribution to harms perpetrated by a third party that will give rise to secondary legal liability; and (b) are clear about the extent to which the principles for assessing secondary liability are applicable to companies.

2.2 Domestic public law regimes are clear as to the principles used to attribute knowledge, intentions, actions and omissions to a company for the purposes of assessing corporate legal liability on the basis of theories of secondary liability.

2.3 Domestic public law regimes treat offences based on theories of secondary liability (a) with the same level of seriousness as the relevant primary offence; and (b) as distinct offences, conceptually and procedurally separate from any primary offences committed by the main perpetrator. As such, a finding of secondary liability is not contingent, in law or in practice, on any judicial determination of liability on the part of the main perpetrator.

Policy objective 3: The principles for assessing corporate liability under domestic public law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.

3.1 Domestic public law regimes take appropriate account of effective measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities.

3.2 Domestic public law regimes take appropriate account of effective measures by companies to supervise their officers and employees to prevent and mitigate adverse human rights impacts.

3.3 Domestic public law regimes make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts.

3.4 Enforcement agencies and judicial bodies have access to and take proper account of robust, credible and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts.

Supporting the work of State agencies responsible for investigation and enforcement

Policy objective 4: State agencies responsible for investigating allegations of business-related human rights abuses and enforcement of domestic legal regimes ("enforcement agencies") have a clear mandate and political support.

4.1 The State effectively supports its enforcement agencies in protecting against business-related human rights abuses.

[b] See A/HRC/32/19/Add.1, para. 5.

4.2 The State takes the steps necessary to ensure that its enforcement agencies have effective working relationships and communication links and are able to coordinate their activities effectively with other domestic bodies that regulate the respect by business enterprises of human rights, including agencies responsible for the regulation of labour, consumer and environmental standards and agencies responsible for the enforcement of laws relating to bribery and corruption.

4.3 The use of discretion on the part of enforcement agencies as to whether to investigate and/or take enforcement action ("enforcement discretion") is exercised in accordance with a comprehensive enforcement policy that: (a) clearly sets out how decisions are made regarding whether to investigate or commence enforcement action and the factors that will be taken into account; (b) has been developed wherever possible following appropriate public consultation; and (c) is made available to the public.

4.4 Enforcement agencies ensure that there is policy coherence between: (a) policies and procedures that set performance targets for their personnel; (b) financial and other performance incentives for such personnel; and (c) policies relating to the use of enforcement discretion.

Policy objective 5: There is transparency and accountability with respect to the use of enforcement discretion.

5.1 Decisions by enforcement agencies not to investigate or take enforcement action are, to the extent possible, subject to formal challenge through a fair and transparent process.

5.2 Enforcement agencies take proactive steps to ensure that, in the event where a request to investigate or take enforcement action has been declined, the complainants in the case are informed (a) of any rights they may have formally to challenge such a decision; and (b) of the procedures that will apply in the event the complainants choose to exercise such rights.

Policy objective 6: Enforcement agencies have access to the necessary resources, training and expertise.

6.1 Enforcement agencies have access to adequate resources to investigate and take enforcement action with respect to allegations of business-related human rights abuses.

6.2 The State has established specialist units, within enforcement agencies or pursuant to applicable legal regimes, that are responsible for the detection, investigation and prosecution of cases of business involvement in severe human rights abuses, and that have access to expertise relating to the investigation of serious offences involving corporate entities, including in cross-border contexts.[6]

6.3 The State ensures adequate training for enforcement agency employees in the legal and technical aspects of investigating allegations of severe business-related human rights abuses.

Policy objective 7: Enforcement agencies carry out their work in such a way as to ensure the safety of victims, other affected persons, human rights defenders, witnesses, whistle-blowers and their legal representatives ("relevant individuals and groups") and is sensitive to the particular needs of individuals and groups at heightened risk of vulnerability or marginalization.

7.1 Systems are in place to ensure that enforcement agency employees take appropriate steps to ensure the protection of relevant individuals and groups from the risk of

[6] See paras. 9.1-9.7 and 10.1 below.

intimidation and reprisals, and compliance with those procedures is properly monitored and evaluated.

7.2 Systems are in place to ensure that enforcement agency employees are aware of and take proper account of issues relating to gender, vulnerability and/or marginalization in their dealings with relevant individuals and groups.

Policy objective 8: Enforcement agencies are able to take decisions independently in accordance with publicly available policies, without the risk of political interference in their operations, and to high ethical standards.

8.1 Enforcement agencies have the ability and independence, in law and in practice, to commence an investigation into and take enforcement action with respect to allegations of business-related human rights abuses at their own initiative and without the need for a formal complaint by or on behalf of an affected person or group.

8.2 Employees of enforcement agencies are held to high standards of personal and professional conduct and laws, and standards relating to legal ethics, conflicts of interest, bribery and corruption are rigorously enforced.

Cooperation in cross-border cases

Policy objective 9: Enforcement agencies and judicial bodies can readily and rapidly seek legal assistance and respond to requests from their counterparts in other States with respect to the detection, investigation, prosecution and enforcement of cross-border cases concerning business involvement in severe human rights abuses.

9.1 The State sets out a clear policy expectation that enforcement agencies and judicial bodies will be appropriately responsive to requests from the relevant agencies of other States in cross-border cases.

9.2 The State ensures that appropriate bilateral and multilateral arrangements are in place to enable enforcement agencies and judicial bodies to request mutual legal assistance from relevant counterparts in other States in cross-border cases.

9.3 The State enables its enforcement agencies, where appropriate, to carry out cross-border investigations and prosecutions through joint investigation teams or other similar arrangements.

9.4 The State ensures that its enforcement agencies and judicial bodies have access to the necessary information, support, training and resources to enable personnel to make the best use of arrangements with other States for cooperation in cross-border cases.

9.5 The State is actively involved with relevant bilateral and multilateral initiatives aimed at improving the ease with which and speed at which (a) requests for mutual legal assistance can be made and responded to; and (b) information can be exchanged between enforcement agencies and/or judicial bodies in cross-border cases, including through information repositories that provide clarity on points of contact, core process requirements and systems for updates on outstanding requests.

9.6 Enforcement agencies and judicial bodies support and encourage the involvement of their personnel in relevant bilateral and multilateral initiatives and networks aimed at (a) facilitating contact and exchange of know-how between counterparts in other States; and (b) promoting awareness of different opportunities and options for international cooperation and the provision of legal assistance in cross-border cases.

9.7 The State keeps under review the scope, adequacy and appropriateness of its arrangements for mutual legal assistance with other States in the light of relevant factors,

such as patterns of inward and outward foreign direct investment, and takes relevant steps to add to or improve such arrangements as necessary.

Policy objective 10: The State works through relevant bilateral and multilateral forums to strengthen methods, systems and legal regimes relevant to cross-border cases concerning business involvement in human rights abuses.

10.1 The State actively participates in bilateral, regional and multilateral initiatives aimed at strengthening domestic legal responses to cross-border human rights challenges with a business connection.

Public law sanctions and other remedies

Policy objective 11: Sanctions and other remedies that may be imposed following a determination of corporate legal liability in cases of business-related human rights abuse offer the prospect of an effective remedy for the relevant loss and/or harm.

11.1 Judicial bodies have the authority and ability, in law and in practice, to impose a range of sanctions following a finding of corporate legal liability in cases of business-related human rights abuse, which may include financial penalties and/or non-financial remedies, such as orders for restitution, measures to assist with the rehabilitation of victims and/or resources, satisfaction (e.g. public apologies) and guarantees of non-repetition (e.g. cancellation of operating licenses, mandated compliance programmes, education and training).

11.2 In each case, the sanctions imposed on companies: (a) are proportional to the gravity of the abuse and the harm suffered; (b) reflect the degree of culpability of the relevant company (e.g. as demonstrated by whether the company exercised appropriate human rights due diligence, the strength and effectiveness of the company's legal compliance efforts, any history of similar conduct, whether the company had responded adequately to warnings and other relevant factors); (c) are designed in such a way as to minimize the risks of repetition or continuation of the abuse and/or harm; (d) are sufficiently dissuasive to be a credible deterrent to that company, and others, from engaging in the prohibited behaviour; and (e) take into account gender issues and the particular needs of individuals or groups at heightened risk of vulnerability or marginalization.

11.3 To the extent possible, victims are appropriately consulted: (a) with respect to the design and implementation of sanctions and other remedies; (b) with respect to any decision to enter into a deferred prosecution agreement, and the terms of any such agreement; and (c) with respect to the terms of any settlement. Such consultation takes into account gender issues and the particular needs of individuals or groups at heightened risk of vulnerability or marginalization.

11.4 State agencies and/or judicial bodies monitor the implementation of sanctions and other remedies and ensure that there is an effective mechanism by which interested persons can report and/or raise a complaint regarding and/or seek remedial action with respect to any non-implementation of such sanctions and/or other remedies.

11.5 The domestic legal system does not permit the tax deductibility of amounts paid as financial penalties following a determination of corporate legal liability for business-related human rights abuses.

II. Private law claims by affected individuals and communities

Principles for assessing corporate legal liability

Policy objective 12: Domestic private law regimes that regulate the respect by business enterprises of human rights ("domestic private law regimes") are sufficiently robust to ensure that there is both proper deterrence from and effective remedy in the event of business-related human rights abuses.

12.1 Domestic private law regimes: (a) provide the necessary coverage with respect to business-related human rights abuses; (b) ensure that there are causes of action for business-related human rights abuses corresponding appropriately to the varying degrees of severity and the different kinds of harm that can result from such abuse; and (c) are clear as to whether and the extent to which they impose legal obligations on companies.

12.2 Domestic private law regimes apply principles for assessing corporate legal liability that focus on the quality of corporate management and the actions, omissions and intentions of individual officers or employees.

12.3 Domestic private law regimes communicate clearly the standards of management and supervision expected of different corporate constituents of group business enterprises with respect to the identification, prevention and mitigation of human rights impacts associated with or arising from group operations, on the basis of their role and position within the group business enterprise, and take proper account of the diversity of relationships and linkages through which business enterprises may operate, including equity-based and contract-based relationships.

12.4 Domestic private law regimes communicate clearly the standards of management and supervision expected of business enterprises with respect to the identification, prevention and mitigation of human rights impacts within their supply chains that a business enterprise may cause or contribute to as a result of its policies, practices or operations.

12.5 In the distribution of evidential burdens of proof between the claimant and the defendant company, domestic private law regimes strike an appropriate balance between considerations of access to remedy and fairness to all parties.

12.6 Corporate legal liability under domestic private law regimes is not contingent, in law or in practice, upon a prior finding of corporate legal liability under any domestic public law regime (e.g. a finding of corporate criminal liability or its functional equivalent).

12.7 Affected persons are not prevented, in law or in practice, from bringing a claim because of an ongoing public law (e.g. criminal) investigation into the same set of facts as the prospective private law claim.

12.8 Domestic private law regimes are clear as to their geographic scope.

12.9 The State regularly reviews[4] whether its domestic private law regimes provide the necessary coverage and the appropriate range of approaches with respect to business-related human rights impacts in the light of evolving circumstances and the State's obligations under international human rights treaties, and takes the necessary legislative and/or policy steps to correct any deficiencies in coverage or approach.

[4] See A/HRC/32/19.Add.1, para. 5, box 1.

Policy objective 13: Private law regimes are sufficiently robust to ensure that there is both effective deterrence from and effective remedy in the event of corporate contributions to business-related human rights abuses perpetrated by third parties.

13.1 Domestic private law regimes (a) communicate clearly the different modes and degrees of contribution to the harms perpetrated by a third party that will give rise to secondary legal liability; and (b) are clear as to the extent to which the principles for assessing secondary liability are applicable to companies.

13.2 Domestic private law regimes are clear as to the principles used to attribute knowledge, intentions, actions and omissions to a company for the purposes of assessing corporate legal liability on the basis of theories of secondary liability.

13.3 Domestic private law regimes treat causes of action based on theories of secondary liability as distinct causes of action, conceptually and procedurally separate from any breaches of law committed by the primary wrongdoer, and such secondary liability is not contingent, in law or in practice, on any judicial finding of liability on the part of the primary wrongdoer.

Policy objective 14: The principles for assessing corporate liability under domestic private law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.

14.1 Domestic private law regimes take appropriate account of effective measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities.

14.2 Domestic private law regimes take appropriate account of effective measures by companies to supervise their officers and employees to prevent and mitigate adverse human rights impacts.

14.3 Domestic private law regimes make appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts.

14.4 Judicial bodies have access to and take proper account of robust, credible and, where appropriate, sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts.

Overcoming financial obstacles to private law claims

Policy objective 15: Claimants in cases arising from business-related human rights abuses have access to diversified sources of litigation funding.

15.1 States prioritize the provision of State funding to claimants who are able to show financial hardship, and ensure that such funding is available on transparent and non-discriminatory terms, taking into account gender issues and the particular needs of individuals or groups at heightened risk of vulnerability or marginalization.

15.2 The domestic legal system permits and encourages pro bono legal services.

15.3 Rules of civil procedure provide for the possibility of collective redress mechanisms in cases arising from business-related human rights abuses, the criteria for which are clearly expressed and consistently applied.

15.4 The domestic legal system permits a range of private funding arrangements, such as funding by third party litigation funders, firms of solicitors (e.g. pursuant to contingency fee and/or "success fee" arrangements) and providers of litigation insurance.

15.5 Providers of private funding arrangements are subject to appropriate regulation to ensure proper standards of service and to guard against abuse and conflicts of interest.

15.6 Potential claimants have access to well-publicized and reliable sources of advice on their options with respect to litigation funding and resourcing, in languages and formats that are both accessible and understandable.

Policy objective 16: Costs associated with bringing private law claims in cases arising from business-related human rights abuses (e.g. lawyer's fees and court fees) are reduced, including through better case management and other efficiency measures.

16.1 Court fees (e.g. initial filing fees, fees for obtaining and copying documents, etc.) are reasonable and proportionate, with the likelihood of waivers for claimants showing financial hardship and in cases where there is a public interest in the litigation taking place.

16.2 Court procedures include readily identifiable, realistic and affordable opportunities for early mediation and settlement.

16.3 Systems exist for the identification of and transparency and judicial accountability with respect to court delays.

16.4 Rules on the allocation of court and legal costs at the conclusion of proceedings are designed to encourage reasonableness on the part of litigants, efficient use of legal and other resources in the pursuit of any claim or defence to a claim and, as far as possible, the swift conclusion of legal claims.

16.5 Rules on security for costs strike a proper balance between the needs of a defendant with respect to the management of financial risks associated with litigation and considerations of access to remedy for claimants.

16.6 Domestic law courts make appropriate use of technologies, including information and communications technologies, to operate in an efficient and cost-effective manner.

16.7 There is the possibility of civil enforcement of legal standards by regulators (i.e. acting on behalf of affected individuals or groups) in appropriate cases.

Cooperation in cross-border cases

Policy objective 17: Claimants in cases arising from business-related human rights abuses are readily and rapidly able to seek legal assistance from relevant State agencies and judicial bodies in other States for the purpose of gathering evidence from foreign individual, corporate and regulatory sources for use in judicial proceedings.

17.1 The State sets out a clear policy expectation that its judicial bodies and other relevant State agencies will be appropriately responsive to requests for legal assistance made for the purposes of obtaining evidence for use in judicial proceedings arising from business-related human rights abuses.

17.2 The State ensures that appropriate bilateral and multilateral agreements are in place to enable its judicial bodies and other relevant State agencies to request legal assistance from relevant counterparts in other States for the purposes of obtaining evidence for use in judicial proceedings arising from business-related human rights abuse.

17.3 The State ensures that its judicial bodies and other relevant State agencies have access to the necessary information, support, training and resources to enable personnel to make the best use of arrangements with other States for cooperation in private law cases.

17.4 The State is actively involved with bilateral and multilateral initiatives aimed at improving the ease with which and speed at which (a) requests for mutual legal assistance

can be made and responded to; and (b) information can be exchanged between judicial bodies and other relevant State agencies in private law cases, including through information repositories that provide clarity on points of contact, core process requirements and systems for updates on outstanding requests.

17.5 Judicial bodies and other relevant State agencies support and encourage the involvement of their personnel in relevant bilateral and multilateral initiatives and networks aimed at (a) facilitating contact and exchange of know-how between their personnel and their counterparts in other States; and (b) promoting awareness of different opportunities and options for international cooperation and the provision of legal assistance in private law cases.

Policy objective 18: The State actively engages in relevant forums and initiatives to seek to improve access to information for claimants and their legal representatives in cross-border cases arising from or connected with business-related human rights abuses.

18.1 The State actively engages in bilateral, regional and multilateral initiatives aimed at improving the ease with which and speed at which information can be exchanged between claimants and their legal representatives and the relevant State agencies of other States in cross-border cases.

18.2 The State engages in bilateral, regional and multilateral initiatives that relate to cross-border access to information regarding the human rights-related risks and impacts of different business activities, and that aim at achieving greater alignment between different domestic legal regimes with respect to issues such as data protection, protection of victims and their legal representatives, protection of whistle-blowers and legitimate requirements of commercial confidentiality.

Private law remedies

Policy objective 19: Private law remedies consequent upon a determination of corporate legal liability offer the prospect of an effective remedy for the relevant abuse and/or harm.

19.1 Judicial bodies have the authority and ability, in law and in practice, to award a range of remedies in private law cases arising from business-related human rights abuses that may include monetary damages and/or non-monetary remedial measures, such as orders for restitution, measures to assist with the rehabilitation of victims and/or resources, satisfaction (e.g. public apologies) and guarantees of non-repetition (e.g. mandated compliance programmes, education and training).

19.2 In each case, the private law remedies awarded to claimants: (a) are proportional and appropriate to the gravity of the abuse and the extent and nature of the loss and/or harm suffered; (b) may, to the extent permitted by the relevant domestic legal system, reflect the degree of culpability of the defendant company (e.g. as demonstrated by whether the company exercised appropriate human rights due diligence, the strength and effectiveness of the company's legal compliance efforts, any history of similar conduct, whether the company responded adequately to warnings and other relevant factors); (c) are designed in such a way as to minimize the risks of repetition or continuation of the harm; and (d) take account of issues of gender and the needs of individuals or groups at heightened risk of vulnerability or marginalization.

19.3 Claimants are consulted with respect to the design and implementation of private law remedies and with respect to the terms of any settlement. Such consultation takes

account of gender issues and the needs of individuals or groups at heightened risk of vulnerability or marginalization.

19.4 Judicial bodies and/or relevant State agencies monitor a company's implementation of private law remedies in an appropriate fashion and ensure that there is an effective mechanism by which interested persons can report and/or raise a complaint regarding and/or seek remedial action with respect to any non-implementation of such remedies.

19.5 The domestic legal system does not permit the tax deductibility of amounts paid as monetary damages following a determination of corporate legal liability in cases arising from business-related human rights abuses.

19.6 The domestic legal system ensures, through appropriate regulation, guidance or professional standards, that monetary damages are distributed among members of affected groups of claimants in a fair, transparent and non-discriminatory way, taking into account gender issues and the needs of individuals or groups at heightened risk or vulnerability or marginalization.